Filed 1/6/15 Imani v. Baranriz CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

BEHZAD IMANI, Plaintiff and Respondent, v. HAMID BARANRIZ, Defendant and Appellant.	H039983 (Santa Clara County Super. Ct. 110CV176550) ORDER MODIFYING OPINION NO CHANGE IN JUDGMENT

BY THE COURT:

It is ordered that the opinion filed herein on December 10, 2014, be modified as follows:

On page 1, footnote 1, delete sentence "Defendant did not include this document in his Appellant's Appendix." and replace with "To the extent that the agreement was reduced to writing, the document was not provided in the Appellant's Appendix."

On page 8, footnote 7, is being deleted.

There is no change in the judgment.

The petition for rehearing is denied.

Dated:_____

_____
Elia, Acting P. J.

_____
Mihara, J.

_____
Márquez, J.

Filed 12/10/14 Imani v. Baranriz CA6 (unmodified version)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

BEHZAD IMANI, Plaintiff and Respondent, v. HAMID BARANRIZ, Defendant and Appellant.	H039983 (Santa Clara County Super. Ct. 110CV176550)

In this action for breach of contract and fraud, plaintiff Behzad Imani obtained a default judgment against defendant Hamid Baranriz. Defendant appeals, contending that the court erred by awarding damages based on a contract that had been superseded by a novation in the form of a settlement agreement. Defendant further argues that the damages awarded in the judgment exceeded the amount established by the prove-up evidence. We find merit in defendant's second point and therefore must reverse the judgment.

Background

Plaintiff initiated this action in July 2010, alleging breach of an agreement relating to the dissolution of the parties' business relationship.[1] According to the complaint, defendant had promised to pay plaintiff "no less than $27,000" and had given plaintiff a check for the agreed-upon amount, $26,966; but the check turned out to have been

[1] Defendant did not include this document in his Appellant's Appendix.

written on a closed account. Plaintiff prayed for that amount plus 18 percent interest. The fraud cause of action was based on the allegation that defendant had repeatedly made false promises to pay plaintiff the $27,000, which was his share of the parties' business obligations.

Defendant did not answer the complaint. In January 2011, however, the parties executed a document bearing the title "SETTLEMENT AGREEMENT BETWEEN BEHZAD IMANI AND HAMID BARANRIZ." The terms of this agreement are set forth here, as they are material to the dispute that followed.

"The following sets forth the terms and conditions of the agreement between Behzad Imani and Hamid Baranriz's representative at the various meetings between Oct 2010, to [*sic*] last meeting which took place on Jan 12, 2011.
The parties agree to the following:

1. In order to clear up debts owed from the business Payless Glass#1, Inc, whereby Hamid Baranriz (Baranriz) and Behzad Imani (Imani) were 50/50 business partners, it is agreed that Baranriz will pay the following debts:
   - Board of Equalization - $16,000
   - Evergreen Publishing - $3,750
   - Corporate Lawyer - $1,500
   - Mtn. View Lawyer - $700

   Total $21,950

   One Half = $10,975 should be deducted from the $26,976 [*sic*] law suit [*sic*].

2. Imani has paid his half of the Payless Glass #1, Inc plus Baranriz's share with the understanding that Baranriz would reimburse Imani, By [*sic*] a check in the amount of $26,976 [*sic*] in July 2009 due on Jan 2010.

3. However, the check was returned due to account closure in Jan 2010.

4. Baranriz promised to pay Imani the amount due him in installment payments.

5. Factoring in 1/2 interest due Imani, then Baranriz owes Imani a total of $16,675 which he agrees to pay Imani in increments of three checks at $5,558 or five checks in increments of $3,335 payable in [*sic*] 14th day of each month.

6. Upon full payment, Imani will sign a release form to Baranriz that payment has been made in full, and will file the release in court, subject to the condition: If Baranriz misses any payments, then Imani will obtain a court judgment by default against Baranriz."

On May 2, 2012, plaintiff filed an application for entry of default, referencing the July 2010 complaint. The clerk entered the default that day. Six months later plaintiff requested a default judgment pursuant to Code of Civil Procedure section 585.[2] The amount he requested as the "[d]emand of complaint" was not the original $26,966 but the amount set forth in the settlement agreement, $16,675. Adding $470 in costs brought the total claim to $17,145.

In support of the request plaintiff submitted a declaration describing the original dissolution agreement (though he represented the consideration as $26,976 rather than $26,966). According to plaintiff, after the parties settled in January 2011, defendant gave him "five checks for $3,335[;] however, the fourth and fifth checks did not clear." Plaintiff also submitted a case summary, in which he asserted that those last two checks "did not clear On Time."

On February 4, 2013, after considering plaintiff's declaration, the court entered judgment for plaintiff and awarded him the amount he had requested, $17,145. On August 1, 2013, defendant filed a motion for a new trial, followed the next day by a notice of appeal. In his motion he argued that the default judgment must be set aside because the settlement agreement was a novation which extinguished the original contract. In defendant's view, because the complaint did not allege any breach of that second agreement (nor could it have, as the second did not yet exist), plaintiff was not entitled to recover the amount claimed in his declaration; instead, "he has to amend the complaint and come back and say you breached the second agreement." Defendant

[2] All further statutory references are to the Code of Civil Procedure except as otherwise indicated.

implicitly urged the court to disregard the allegations of the complaint as well, by insisting that plaintiff "take nothing by his Complaint."

After initially denying the new-trial motion as filed beyond the prescribed 180 days under section 659 the court recognized the motion as in fact timely and set aside that ruling.[3] Addressing the merits, however, the court determined that the settlement agreement was not a novation as defendant had asserted, but an "acknowledgment of credit," and as such it had not extinguished the contract on which the action was based.[4] Accordingly, the court denied the motion for a new trial.[5]

Discussion

1. Scope of Review

As noted, defendant filed his notice of appeal from the judgment on August 2, 2013, the day after his notice of motion for a new trial. That judgment is appealable. (*Bristol Convalescent Hospital v. Stone* (1968) 258 Cal.App.2d 848, 858-859.) In the course of our review, we may also address the denial of defendant's motion for a new trial. (See *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1739, fn 3 [order denying a motion to set aside a default is not appealable but may be reviewed on appeal from the default judgment.)

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[3] The court had originally calculated the 180 days as extending from December 11, 2012. Defendant moved to vacate that order, pointing out that the judgment was actually entered February 4, 2013, making the August 1 new-trial motion timely.

[4] The court's view of the settlement agreement as containing an acknowledgment of credits is consistent with plaintiff's declaration, in which he stated that the $16,675 he was to receive "reflects credits for Defendant's payments." At the hearing on the new-trial motion the judge asked plaintiff whether her understanding of this characterization was accurate, and plaintiff confirmed that it was.

[5] The court also expressed reluctance to rule on the merits because this appeal was pending. It need not have been concerned. "[A] motion for a new trial is collateral to the judgment and may proceed despite an appeal from the judgment." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal. 4th 180, 191.)

The issues we may entertain, however, are limited. A default judgment " 'is said to "confess" the material facts alleged by the plaintiff[;] i.e., the defendant's failure to answer has the same effect as an express admission of the matters well pleaded in the complaint.' " (*Steven M. Garber & Associates v. Eskandarian* (2007) 150 Cal.App.4th 813, 823.) Accordingly, where a cause of action is stated in the complaint, the plaintiff need not prove liability of a defaulting defendant. (*Ostling v. Loring, supra,* 27 Cal.App.4th at p. 1745.) On the other hand, "if the well-pleaded allegations of the complaint do not state any proper cause of action, the default judgment in plaintiff's favor cannot stand." (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 282 (*Kim*).)

In addition, because defendants are entitled to notice of the plaintiff's demand, section 580[6] limits the court's authority to award damages to the amount stated in the complaint. "The primary purpose of this section is to ensure that defendants in cases which involve a default judgment have adequate notice of the judgments that may be taken against them." (*Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 493.) Likewise, section 585, subdivision (b), the provision under which plaintiff sought a default judgment, "[t]he court shall hear the evidence offered by the plaintiff, and shall render judgment in the plaintiff's favor for that relief, not exceeding the amount stated in the complaint, in the statement required by Section 425.11 [for personal injury or wrongful death actions], or in the statement provided for by Section 425.115 [seeking punitive damages], as appears by the evidence to be just."

2. Defendant's Liability

In this case, defendant appears to be challenging the viability of plaintiff's contract cause of action as well as the amount of the damages awarded. He views the claim for

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[6] Section 580, subdivision (a), states, in pertinent part: "The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint . . . ."

$17,145 as a claim under the January 2011 settlement agreement, which superseded and extinguished the original contract. Since the settlement agreement was not the basis of the 2010 complaint, defendant believes *no* damages should have been awarded and the judgment must therefore be reversed.

Defendant's suggestion that he owes plaintiff nothing in this action is untenable. "In an appeal from a default judgment, review of the default judgment is limited to questions of jurisdiction, sufficiency of the pleadings and excessive damages, if the damages awarded exceed the sum sought in the complaint. [Citations.]" (*Steven M. Garber & Associates v. Eskandarian*, *supra*, 150 Cal.App.4th at p. 824; see also *Kim*, *supra*, 201 Cal.App.4th at p. 288 [defendant may challenge sufficiency of the evidence offered to support default judgment].) Defendant's default in this case was tantamount to an admission that he owed plaintiff a sum of money under their original contract to dissolve their partnership. No defect in the complaint is either apparent or asserted. Thus, defendant cannot be heard to complain of error on appeal unless (1) the lower court was deprived of jurisdiction to grant any relief on the ground that the contract underlying the lawsuit no longer existed; or (2) if the court did retain jurisdiction, the damages it awarded were excessive in light of plaintiff's prove-up evidence.

Defendant invokes the concept of novation to answer the first question in the affirmative. In effect, by insisting that plaintiff "is 'legally entitled' . . . to recover nothing," he appears to argue that the court was not empowered to award any damages for breach of an extinct contract.

"Novation is the substitution of a new obligation for an existing one." (Civ.Code, § 1530.) It may substitute a new debtor, a new creditor, or, as here, "a new obligation between the same parties, with intent to extinguish the old obligation." (Civ. Code, § 1531.) "Novation is made by contract, and is subject to all the rules concerning contracts in general." (Civ.Code, § 1532.) "Essential to a novation is that it 'clearly appear' that the parties intended to extinguish rather than merely modify the original

agreement. [Citations.] The burden of proof is on the party asserting that a novation has been consummated." (*Howard v. County of Amador* (1990) 220 Cal.App.3d 962, 977.)

"Where there is conflicting evidence the question whether the parties to an agreement entered into a modification or a novation is a question of fact. (*Wade v. Diamond A Cattle Co*. [1975] 44 Cal.App.3d [453,] 457.) However where, as here, the issue turns upon the meaning of a written instrument and there is no conflicting extrinsic evidence, then the question is one of law upon which a reviewing court may exercise its independent judgment." (*Howard v. County of Amador*, *supra*, 220 Cal.App.3d at p. 980.) Defendant acknowledges that there was no conflicting evidence about the terms of the two contracts in this case and that whether a novation took place is a question of law. The issue, as he purports to frame it, is whether plaintiff " 'proved up' " the very claim asserted in the complaint. According to defendant, plaintiff did not. Because there was an "incongruity between the complaint and the evidence in the prove-up proceeding," plaintiff was "*NOT* legally entitled to recover anything on account of the causes of action alleged in his Complaint." (Emphasis in the original.)

Defendant construes the settlement provision authorizing a default judgment to apply to a *new* action on the settlement agreement itself rather than a judgment for breach of the *original* contract. We disagree with that construction. The settlement agreement permitted plaintiff to "obtain a court judgment by default against Baranriz." The only action to which that "judgment by default" could pertain is the only one in existence—that is, the July 2010 lawsuit for breach of the original contract. Moreover, the settlement agreement expressly referred to the existing action by setting forth the amount "should be deducted from the $26,976 [*sic*] law suit [*sic*]." It is obvious that the parties intended the July 2010 action to remain active.

If, as is evident here, the parties were anticipating a default judgment on the only action in existence, that action was in turn based on the only *contract* in existence when the action was filed. The reduction in the amount defendant owed plaintiff expressly

referred to the amount previously claimed in the lawsuit, which was in turn based on the original contract. If the parties' intent had been to extinguish the original contract, they would not have agreed in the settlement agreement that the pending lawsuit *on that contract* was still valid; instead, they would have indicated that plaintiff was entitled to bring a *new* action on the *new* contract and thereafter obtain a default judgment in that new action.

There is no basis for defendant's suggestion that plaintiff was attempting to obtain damages for breach of the wrong contract, i.e., the later settlement agreement. Plaintiff adhered to the terms of the settlement agreement by seeking a default judgment in the pending lawsuit *and* by limiting his claim to the reduced amount of the debt. Nothing in the settlement document expresses a clear intent to extinguish, rather than modify, the obligations stated in the original contract dissolving the partnership.[7] Whether the recalculation of the debt represents an "acknowledgment of credits," as the lower court found, or is simply the product of additional negotiation and compromise is immaterial. In either case, the outcome was not a substitution of defendant's obligation but only a reduction of the amount plaintiff had previously claimed he was owed. Defendant did not demonstrate otherwise. Consequently, he failed to meet his burden to establish that a novation was created by the settlement agreement.

Another issue was raised in defendant's motion, however, that requires further attention. In the motion for a new trial he argued that the "Default Judgment is also insufficiently justified by the evidence." On appeal he repeats this assertion, though it is predicated on a supposed "incongruity between the complaint and the evidence in the prove-up proceeding." As we have explained, the disparity between the prove-up evidence and the demand in the complaint is of no consequence; all that happened

[7] Unquestionably it would have been helpful to have the original contract in the record.

between 2010 and 2011 is that for one reason or another plaintiff agreed that defendant could pay less than $26,966. Nor is there any issue here involving a judgment exceeding the amount of damages stated in the complaint. On the contrary, plaintiff's request for a default judgment *reduced* the amount of his July 2010 claim by more than $10,000. Instead, what is of concern is whether the damages award was supported by the evidence presented in plaintiff's request. We therefore turn to that issue.

3. Excessiveness of Damages

Even where a plaintiff's complaint justifies a judgment in his favor, he is "not automatically entitled to entry of that judgment by the court, simply because the defendant defaulted. Instead, it is incumbent upon the plaintiff to *prove up* his damages, with actual evidence." (*Kim*, *supra*, 201 Cal.App.4th at p. 272.) "It is imperative in a default case that the trial court take the time to analyze the complaint at issue and ensure that the judgment sought is not in excess of or inconsistent with it. It is not in plaintiffs' interest to be conservative in their demands, and without any opposing party to point out the excesses, it is the duty of the court to act as gatekeeper, ensuring that only the appropriate claims get through. That role requires the court to analyze the complaint for itself--with guidance from counsel if necessary—ascertaining what relief is sought as against each defaulting party, and to what extent the relief sought in one cause of action is inconsistent with or duplicative of the relief sought in another." (*Heidary v. Yadollahi* (2002) 99 Cal. App. 4th 857, 868; *Barragan v. Banco BCH* (1986) 188 Cal.App.3d 283, 302 ["[p]laintiffs in a default judgment proceeding must prove they are entitled to the damages claimed"].)

The procedure outlined in section 585, subdivision (b), provides for the taking of evidence on damages when the case involves a more complicated determination of damages than can be achieved by a clerk's ministerial act, such as "amounts [that] require either an accounting, additional evidence, or the exercise of judgment to ascertain (such as emotional distress damages, pain and suffering, or punitive damages) . . . In such

cases, the plaintiff must affirmatively establish his entitlement to the specific judgment requested." (*Kim, supra*, 201 Cal.App.4th at p. 287.) A statement of damages alone "cannot be relied upon to establish a plaintiff's monetary damages, except in cases of personal injury or wrongful death." (*Id*. at p. 286.) Instead, the plaintiff must "provide the court with sufficient evidence to 'prove up' his entitlement to any damages." (*Id*. at p. 287-288 [conclusory demand for $5 million insufficient as prove-up evidence].) The evidence may be by affidavit, as long as the facts stated within it are within the affiant's personal knowledge. (§ 585, subd. (d); *Kim, supra*, at p. 287.)

In a prove-up proceeding the plaintiff must establish a prima facie case. (*Johnson v. Stanhiser* (1999) 72 Cal.App.4th 357, 361.) "It is also true that where a cause of action is stated in the complaint and evidence is introduced to establish a prima facie case the trial court may not disregard the same, but must hear the evidence offered by the plaintiff and must render judgment in his favor for such sum, not exceeding the amount stated in the complaint, or for such relief, not exceeding that demanded in the complaint, as appears from the evidence to be just." (*Taliaferro v. Davis* (1963) 216 Cal.App.2d 398, 408-409 [italics omitted]; accord, *Johnson v. Stanhiser*, *supra*, at pp. 361-362.) "On appeal, defendant may challenge the sufficiency of the evidence offered to support the default judgment." (*Kim*, *supra*, 201 Cal.App.4th at p. 288; cf. *Ostling v. Loring*, *supra*, 27 Cal.App.4th at p. 1745 [where recovery of damages in default judgment requires proof, sufficiency of the evidence may be reviewed on appeal]; see *Barragan v. Banco BCH*, *supra*, 188 Cal.App.3d at p.302 [punitive damages as a percentage of defendant bank's net worth unsupported by sufficient evidence].)

In this case the damages award was based on plaintiff's declaration that he was owed $16,675 plus $470 in costs. The principal amount was supported by the settlement agreement attached to the request for entry of judgment. But also attached to that request were copies of the checks defendant had written to satisfy that $16,675 obligation. Unlike the previous $26,966 check, these checks appear to have cleared. It may be, as

plaintiff stated in his "Case Summary in Support of Application for Default Judgment," that the last two checks did not clear *on time*; and it is true that the settlement agreement allowed plaintiff to obtain a default judgment if defendant "misses any payments." But the agreement did not provide for a monetary penalty for late payments. Plaintiff did obtain a default judgment, as the agreement provided, but he was not further entitled to damages exceeding—indeed, duplicating—amounts he had already received.

It does not appear that the superior court considered the evidence supplied by plaintiff, because it awarded him the entire amount of damages he requested. We conclude, therefore, that this matter must be remanded to give the lower court the opportunity to determine the proper amount of damages, plus interest if warranted, from the prove-up evidence already submitted by plaintiff. As defendant remains in default, however, he is not entitled to participate in this proceeding. (*Barragan v. Banco BCH*, *supra*, 188 Cal.App.3d at pp. 302-303; *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385-387; *Scognamillo v. Herrick* (2003) 106 Cal. App.4th 1139, 1151.)

Disposition

The judgment is reversed, and the matter is remanded for a new prove-up proceeding at which the superior court shall determine the amount of damages to which plaintiff is entitled. The parties shall bear their own costs on appeal.

_____

ELIA, Acting P. J.

WE CONCUR:

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MIHARA, J.

_____

MÁRQUEZ, J.